86-1346 (1)

Supreme Court, U.S.
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Cause No. _____

In the
Supreme Court of the United States
October Term, 1986

ROBERT MATCHA AND ANNE MORGAN MATCHA

Petitioners,

-v.-

JIM MATTOX, ATTORNEY GENERAL OF TEXAS
ON BEHALF OF THE PEOPLE OF TEXAS

Respondent

Petition for a Writ of Certiorari
To The Court Of Appeals
For The Third Supreme Judicial District Of Texas
Sitting In Austin, Texas

Karen A. Lerner
Michael B. Charlton
2110 Richmond Avenue
Houston, Texas 77098
(713) 526-1630
Bar No. 12223300

Counsel for Petitioners

February 16,1987

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QUESTIONS PRESENTED FOR REVIEW

The State of Texas enacted the Texas Open Beaches Act, codifying the means and manner by which the public's easement over certain portions of the beaches of the State was to be determined. Outside of that act, and based upon a purported common law right, an easement was created over the land owned by Petitioners which required that they remove their house, remove sand dunes and vegetation, and hold their land open for public use as a beach.

I.

Whether the State of Texas can avoid the implications of a constitutional taking by characterizing its action below as the adjudication of private property rights?

II.

Whether the imposition of a "common law" public easement by the State of Texas over the property of Petitioners constitutes a taking as defined by the Fifth Amendment of the United States Constitution?

LIST OF NAMES OF PARTIES

The parties to the proceedings below were the Petitioners, obert L. Matcha and Anne Morgan Matcha, and the Respondent, n Mattox, Attorney General of the State of Texas on Behalf of e People of the State of Texas.

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October Term, 1986

Robert Matcha and Ann Morgan Matcha
Petitioners,

v.

Jim Mattox, Attorney General of Texas,
On Behalf of the People of Texas
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE THIRD SUPREME JUDICIAL DISTRICT OF TEXAS SITTING IN AUSTIN, TEXAS

The Petitioners Robert Matcha and Anne Morgan Matcha respectfully pray that a writ of certiorari issue to review the Judgment and opinion of the Court of Appeals for the Third Supreme Judicial District of the State of Texas, sitting in Austin, Texas, rendered on May 21, 1986, and from which the Supreme Court of Texas denied writ of error on November 19, 1986.

OPINIONS BELOW

The opinion of the Court of Appeals for the Third Supreme Judicial District of Texas is reported at 711 S.W.2d 95 (Tex. App. - Austin 1986, writ refused n.r.e.). The Judgment of this Court was rendered on May 21, 1986. A Motion for rehearing was filed and overruled. An Application for Writ of Error was timely filed in the Supreme Court of Texas. The order of the Supreme Court of Texas denying the application for writ of error on November 19, 1986, is reprinted in the appendix hereto, p. A-18, infra.

JURISDICTION

Petitioners invoke the jurisdiction of this Court pursuant to the provisions of 28 U.S.C.A., sec. 1257.

CONSTITUTION AND STATUTORY PROVISIONS INVOLVED

That portion of the Fifth Amendment to the United States Constitution, which reads as follows:

> No person shall be . . . deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

That portion of the Fourteenth Amendment of the United States Constitution, which reads as follows:

> No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Those portions of the Texas Natural Resources Code, sec. 61.001, et. seq. as follows:

Sec. 61.001(5).

"Public beach" means any beach area, whether publicly or privately owned, extending inland from the line of mean low tide to the line of vegetation bordering on the Gulf of Mexico to which public has acquired the right of use or easement to or over the area by prescription, dedication, presumption, or has retained a right by virtue of continuous right in the public since time immemorial as recognized in law and custom.

Sec. 61.013.
Prohibition of Obstruction

(b) For purposes of this section, "public beach" shall mean any beach bordering on the Gulf of Mexico which extends inland from the line of mean low tide to the natural line of vegetation bordering on the seaward shore of the Gulf of Mexico, or such larger contiguous area to which the public has acquired a right of use or easement to or over by prescription, dedication, or estoppel, or has retained a right by virtue of continuous right in the public since time immemorial as recognized by law or custom . . .

Sec. 61.016.
Boundaries for Areas With No Marked Vegetation Line

(a) To determine the elevation reached by the highest waves of the Gulf of Mexico, in any area in which there is no clearly marked vegetation line (for instance, a line immediately behind well-defined dunes or mounds of sand and at a point where vegetation begins) recourse shall be to the nearest clearly marked line of vegetation on each side of the unmarked area.

(b) The "line of vegetation" for the unmarked area shall be the line of constant elevation connecting the two clearly marked lines of vegetation on each side.

(c) If the elevation of the two points on each side of the area are not the same, the extension defining the line reached by the highest waves of the Gulf shall be the

average elevation as between the two points, but if there is no clearly marked line of vegetation, the extended line shall not extend inland further than 200 feet from the seaward line of mean low tide.

Sec. 61.017.
Line of Vegetation Unaffected by Certain Conditions

(a) The "line of vegetation" is not affected by the occasional sprigs of salt grass on mounds and dunes or seaward from them and by artificial fill, the addition or removal of turf, or by other artificial changes in the natural vegetation of the area.

(b) If the changes listed in subsection (a) of this section are made and the vegetation line is obliterated or is created artificially, the line of vegetation shall be determined in the same manner as in those areas covered by Section 61.016 of this Code, but if there is a vegetation line consistently following a line of more than 200 feet from the seaward line of mean low tide, the 200 foot line shall constitute the landward boundary of the area subject to public easement until a final court adjudication establishes the line in another place.

Sec. 61.018.
Suit to Remove Obstructions

(a) The Attorney General or any County Attorney, District Attorney, or Criminal District Attorney shall file in a district court of Travis County, or in the county in which the property is located, a suit to obtain either a temporary or permanent court order or injunction to remove any obstruction or barrier or to prohibit any restraint or interference which restrict the right of the public, individually or collectively, to free and unrestric ed ingress and egress to and from any area described in Section 61.012 of this code or any property abutting on or contiguous to the state-owned beach on which the public has acquired a prescriptive right.

STATEMENT OF THE NATURE OF THE CASE

The State of Texas filed a suit against Petitioners pursuat to the provisions of Tex.Nat.Res.Code Ann., sec. 61.001 et seq. (hereinafter referred to as the Texas Open Beaches Act) purportedly to adjudicate the State of Texas's right to an easement across the land owned by the Matchas.

The Matchas owned a lot in the Sea Isle subdivision on Galveston Island, Galveston, Texas. Prior to and after August 18, 1983, a house owned by the Matchas stood on this land. The house was surrounded by a fence. On August 18,1983, hurricane Alicia made landfall on Galveston Island and caused damage to the home owned by the Matchas. Additionally, the hurricane did a substantial amount of damage to the natural ecology of Galveston Island, a barrier island.

Following the hurricane, the Matchas began repairing their home. The State of Texas posted notice that the Matchas were in violation of the law and that they should cease the repairs. When the Matchas continued to repair their house, the State of Texas sought and obtained a temporary injunction prohibiting the Matchas from completing the repairs on their house or planting any vegetation to aid the regeneration of the beach following the huricane.

The State of Texas claimed that as a result of the temporary disruption of the dunes and vegetation on West Beach in Galveston, Texas, caused by hurricane Alicia, the State of Texas immediately acquired an easement over the property of the Matchas, in that the *"visible"* line of vegetation,[1] was, following the hurricane, behind their house. The State contended that their suit was brought under the Texas Open Beaches Act to remove the Matchas' property as an obstruction on the public beach. See appendix, page 1, infra.

The Petitioners' contended that the creation of an easement on a public beach was governed by the provisions of Tex. Nat. Res.

[1] This line, in most cases constitutes the statutory boundary of the public easement over the beach. Tex. Nat. Res. Code, Ann., Sec. 61.001(5).

Code Ann., sec. 61.001 et seq. and was not the adjudication of private property rights. The enactment of the Texas Open Beaches Act created a statutory means for the determination of the public's easement over the beaches of the entire State of Texas. If, in fact, the State of Texas did have an easement over the Matchas land as a result of the acts of the hurricane, then the imposition of that easement constituted a taking as defined by the Fifth Amendment of the United States Constitution, as made applicable to the states by the Fourteenth Amendment.

The action was tried to a jury. During the course of the proceedings, the State of Texas stipulated that Matcha had received no compensation for the easement over the land. The State's expert witness, Dr. Robert Morton, testified that the natural line of vegetation had, as a result of Hurricane Alicia,moved landward of the Matcha property approximately 150-200 feet. He stated that this phenomenon had occurred after other hurricanes and that the line of vegetation "inevitably" moved seaward as the beach recovered from the hurricane. He could not state how long the recovery process would take or where the eventual permanent vegetation line would locate. He did state that in all other respects, the various beach landmarks had recovered to their pre-Alicia location by the time of trial including the sandy beach most used by the public.[2] Other witnesses testified about their activity on the open beach in front of the line of vegetation; none could testify, however, about activities conducted on the Matchas' property or on property exposed as a result of Alicia

At the conclusion of the evidence the Trial Court instructed a verdict for the State of Texas despite the fact that numerous witnesses had testified to the location of the public's easement in a manner other than contended by the State of Texas.[3]

[2] This is the portion of the beach that the citizens who testified during the trial considered to be the public beach, or the open beach used by the public.

[3] Under Texas procedure, where a Motion for Instructed Verdict has been filed by one of the parties, the Trial Court must accept as true all evidence in favor of the adverse party which supports the adverse party's contention. If a fact issue is raised, the Motion should not be granted. *Jasper-Newton Elec. Coop, Inc. v. Martin,* 647 S.W.2d 59 (Tex. App. - Beaumont 1983, writ refused n.r.e.). All facts must then be construed by the Appellate Courts in favor of the losing party. See cases cited infra.

Further, during the course of the trial, several witnesses testified that the location of the State's easement, as defined by the provisions of the Open Beached Act[4] in cases of vegetation line obliteration, was fifty feet seaward of the Matchas' surveyed property line.

The Trial Court then entered a Judgment requiring the Matchas to remove their house, to remove the dunes and vegetation growing on the land, and to allow the public the right of access across the land. By this Judgment the Trial Court effected an all but complete taking of the economic value of the property owned by the Matchas in that they are deprived of all beneficial use of the property.

The question of the taking without compensation was presented in the Trial Court at the time of the stipulation as to no compensation made by the State of Texas. This question was again presented to the Court of Appeals for the Third Supreme Judicial District of Texas as points of error in the brief of the Appellants. The question was raised in the application for rehearing before the Court of Appeals. The Court of Appeals declined to address the issue in its opinion or on rehearing. The issue was again raised by points of error in the Appellants' Application for Writ of Error to the Supreme Court of Texas.

[4] Sec. 61016

REASONS FOR GRANTING THE WRIT
BRIEF OF THE ARGUMENT

This petition presents two constitutional issues, one of which is a constantly recurring and substantial question of constitutional significance. See, e.q., *Colorado v. Bertine.* 107 S.Ct. 738 (1987). The first issue is whether the State of Texas can avoid the Fifth Amendment just compensation requirement altogether by factiously characterizing its action against Petitioners as one in the nature of an adjudicaton of private rights. The second, a consistently recurring constitutional problem, is whether the action of the State of Texas constitutes a taking within the meaning of the Fifth Amendment.

While it is certainly clear that this Court has on many accasions addressed the Fifth Amendment taking issue, there is little or no quidance or authority to determine when an action is "state action" for purposes of the Fifth Amendment. If the action below is in the nature of "state action," then it is absolutely clear that there has been a taking and this Court should summarily reverse the Courts below. The attempt by the State of Texas to avoid the restrictions and requirements of the Fifth Amendment by characterizing its action as a private action, will set a model for other jurisdictions to usurp the private property rights of citizens if this issue is not addressed by the Court.

This case places squarely before the Court the balance between the public and private interests of beach development. The case contains questions of major importance for all states with coastal beach areas. As the competition between development of the beaches and barrier islands and preservation of the enviroment increases, the issues addresseed herein are likely, and in all probability, will need to be addressed by other states,and the federal government. If the states are allowed to engage in regulatory actions in the manner of the State of Texas, then private property rights in coastal areas will no longer exist.

I.

Can the State of Texas avoid the implications of a constitutional taking by characterizing its action below as the adjudication of private property rights?

This Court should grant Petitioners' application for certionari on the first issue in order to determine whether the actions of the State of Texas in imposing an easement over the land of the Petitioners constituted state action within the meaning of the Fifth Amendment.

At the outset, it should be noted that under Texas law, the facts presented during the trial of a cause of action, where an instructed verdict has been granted, must be construed in a light most favorable to the Petitioners. *Henderson v. Travelers Ins. Co.*, 544 S.W.2d 649 (Tex. 1976); *Harpold v. Moss*, 101 Tex. 540, 109 S.W.2d 928 (1908); *Echols v. Wells*, 510 S.W.2d 916 (Tex. 1974); *Kindred v. Con-Kin, Inc.* 650 S.W.2d 61 (Tex. 1983); *T.E.I.A. v. Page*, 553 S.W.2d 98 (Tex. 1977); *Glenn v. Prestorod*, 456 S.W.2d 901 (Tex. 1970).

The Court of Appeals summarily disposed of Petitioners' Costitutional claim by holding that the public had acquired its easement not by virtue of the Open Beaches Act, but by custom. It is Petitioner's contention that the State of Texas cannot ignore the requirements of the Fifth Amendment by characterizing its action as the establishment and adjudicatin of public rights.

In the first case construing the Open Beaches Act, *Seaway Co. v. Attorney General of Texas*, 375 S.W.2d 923 (Tex.Civ. App.-Houston [1st] 1964, writ ref'd n.r.e.) the Texas Court stated that it was unnecessary to address the constitutional taking issue because the Attorney General had only relied upon the Open Beaches Act for his authority to bring the suit on behalf of the people of Texas. The court reasoned that, rather than use the definitions of "beach" and "line of vegetation" provided by the Act, the State was merely seeking to enforce rights long held by the public over the open beach. Since *Seaway*, Texas Courts have never addressed the constitutional implications of the Open Beaches Act.

Petitioners contend that the approach adopted by the State of Texas is constitutionally untenable for two reasons:

1. It allows States to destroy the value of privately held property without regard to the restrictions of the Fifth and Fourteenth Amendments; and

2. Under the facts of the case at bar, it represents an unmitigated fiction in that there was absolutely no testimony by any individual of the public's use of Petitioners' property presented during the trial.

In cases construing the "state action" requirement of 42 U.S.C., sec. 1983, "the question whether particular conduct is private' on the one hand, or state action,' on the other, frequently admits of no easy answer." *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345 (1974). In such cases, the inquiry must be whether there is a sufficiently close nexus between the State and the challenged action of the regulated entity so that the action of the latter may be fairly treated as that of the State itself. *Jackson v. Metropolitan Edison Co.*, 419 U.S. at 351. The issue is whether the government action is so intrusive of the private activity as to become its alter ego. In *Burton v. Wilmington Parking Authority*, 365 U.S. 715 (1961), the Court found the necessary state action for purposes of 42 U.S.C., sec. 1983, where the defendant leased space to a private restaurant which refused service to blacks. This Court held that the State had so far insinuated itself into a position of interdependence with the private entity that it became a joint participant of the business. In *Jackson v. Metropolitan Edison Co. supra*, this Court rejected the State action claim of an electric utility customer because the utility had merely exercised an option allowed by state law; the initiative to make the decision to terminate the customer's utilities had come from the company, not the state. 419 U.S. at 357. State action has been found where a state employee enforced private property rights. *Griffin v. Maryland*, 378 U.S. 130 (1964).

In the area of First Amendment claims, this Court has found the necessary government action where there was a sufficiently close relationship between the government action and the private entitly as to make it necessary to consider the First Amendment. *Public Utilities Comm'n v. Pollak*, 343 U.S. 451 (1952).

Petitioners contend that the cases construing state action for purposed of the Fourteenth Amendment should be applied to the Fifth Amendment taking clause as well.

In all cases construing the Open Beaches Act, there has never been a private party litigant seeking to enforce his private rights to the open beach. All reported suits have been brought in the name of the State of Texas by its elected Attorney General. *Seaway Company v. Attorney General of Texas, 375 S.W.2nd 923 (Tex.Civ. App. - 1964, writ refused n.r.e.); Moody v. White,* 593 S.W.2d 372 (Tex.Civ. App. - Corpus Christi 1979); *Feinman v. The State of Texas,* 717 S.W.2d 106 (Tex.App. - Houston [1st] 1986); *Villa Nova Resort, Inc. v. The State of Texas,* 711 S.W.2d 120 (Tex.App. - Corpus Christi 1986). The Open Beaches Act makes it clear that only the Attorney General, district attorney, or county attorney in the county affected may bring such a suit. Tex.Nat.Res.Code, Ann., Sec. 61.018. [5] In the case at bar, it was the State Attorney General who served notice on Petitioners that their rebuilding efforts violated State law.It was the State Attorney General who sought to enjoin Petitioners' action and who successfully prosecuted the suit. Thus, it is clear that the challenged activity, the imposition of the public easement, is so completely dominated by public authorities in the person of the State Attorney General as to be nothing more than state action.

As to the second issue, the characterization of the action below as one seeking to adjudicate private rights is a fiction. The Court of Appeals upheld the action of the trial court on the basis of the common law of custom and migrating easements. Petitioners never contended that such concepts could not apply in the proper case; Petitioners urge that the facts of the case at bar simply do not support those theories. The State never established that the

[5] An individual may bring a declaratory judgment action against the State of Texas to determine the extent and nature of the public beach and adjudicate rights. *Villa Nova Resort, Inc. v. The State of Texas,* 711 S.W.2d 120 (Tex. App. - Corpus Christi 1986). In such cases, it is the Attorney General who represents the State interest. Individuals in these cases are owners of property adjacent to the beach.

forces giving rise to an easement by custom or a migrating easement ever operated on Petitioners' property.

There was no dedication of the property to the State of Texas. *Viscardi v. Pajestka,* 576 S.W.2d 16 (Tex. 1978); *O'Conner v. Gragg,* 339 S.W.2d 878 (Tex. 1960); *City of Houston v. Scanlon,* 37 S.W.2d 17 (Tex. 1931). There was no prescription. *Brooks v. Jones,* 578 S.W.2d 233 (Tex. 1979); *Stark v. Morgan,* 602 S.W.2d 298 (Tex.Civ.App. - Dallas 1980, writ refused n.r.e.); *Rocha v. Campos, 574 S.W.2d 233 (Tex.Civ.App. - Corpus Christi 1978); Dortch v. Sherman County,* 212 S.W.2d 1018 (Tex.Civ.App. - Amarillo 1948); *Miracle v. Hines, 247 S.W.2d 611 (Tex.Civ.App. - Ft. Worth 1952).* There was no shifting fo an easement already existing in the State of Texas by way of the natural forces which originally gave rise to that easement. *Dortch v. Sherman County, supra.*

The evidence only showed that prior to Hurricane Alicia, the public used the beach area up to the line of vegetation, a line seaward of the Petitioners' property. As a result of Hurricane Alicia, the vegetation line was temporarily relocated at a point landward of the questioned property. None of the witnesses who testified about the customary use of the beach stated that they used Petitioners' property after the Hurricane. In fact, the evidence shows that because of the reconstructed vegetation line and the wreckage of the Petitioner's house, no one used the property at all after the hurricane.

Thus, the only legal basis for the State's claim was the presumption of public use created by the definition of "beach" in the Open Beaches Act. Tex.Nat.Res.Code Ann., Sec. 61.001(5). In a sister case, *Feinman v. The State of Texas, supra.,* the Court held, based on the identical facts, that the State's easement was established pursuant to the rolling easement of the Open Beaches Act.

For these reasons, the Petitioners' contend that their Petition for Writ of Certiorari should be granted. The State of Texas should not be allowed to characterize its actions as private in order to avoid the requirements of the Fifth Amendment.

II.

Does the imposition of a "common law" public easement by the State of Texas over the property of Petitioners constitute a taking as defined by the Fifth Amendment of the United States Constitution?

The question of taking within the dictates of the Fifth Amendment is a constantly recurring problem of major significance. See, e.g., *Colorado v. Bertine,* 107 S.Ct. 738 (1987) The Texas Courts have consistently refused to recognize past decisions of this Court in their interpretations of the Texas Open Beaches Act as it relates to the Petitioners.

The evidence was stipulated by the parties at the trial that no money had been offered by the State of Texas in return for forcing the Matchas to destroy their home in creation of the public beach easement.

As such, the Judgment affirmed by the Court of Appeals allows a taking or more specifically "an application to public use" of the Matcha property within the meaning of the Fifth Amendment of United States Constitution for which the Matchas have received no compensation.

> It is well established as a matter of law that governmental regulation can effect a Fifth Amendment taking. (Citations ommitted) The rationale, as stated by Justice Brennan is that "[p]olice power regulations such as zoning ordinances and other land-use restrictions can destroy the use and enjoyment of property in order to promote the public good just as effectively as formal condemnation or physical invasion of property." *San Diego Gas & Electric Co. v. San Diego,* 450 U.S. 621, 101 S.Ct. 1287, 67 L.Ed.2d 551 (1981) (Brennen, J., Dissenting). While, "Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law," (Citations omitted), the principle generally

> applied is that "if regulation goes too far it will be recognized as a taking." (Litations omitted)

Deltona Corp. v. United States, 657 F.2d 1184 (U.S. Ct. Claims 1981), cert. denied, 445 U.S. 1017 (1982); *Penn Central Transportation Company v. City of New York*, 438 U.S. 1040, 98 S.Ct. 2646, 57 L.Ed.2d 631 (1978).

The Judgment of the Trial Court requiring the removal of the a house, sand dunes, and vegetation was impressed upon the Petitioners' land. See Appendix, A-1, infra. This Judgment is an appendage to the land, and constitutes a "regulatory taking." *Pennsylvania Coal Company v. Mahon*, 260 U.S. 393 (1922). Excessive regulation of an individuals' property that has the effect of depriving that individual of the right to use his property, is a taking compensable under the Fifth Amendment. *Ruckelshaus v. Monsanto Co.*, 104 S.Ct. 2862 (1984); *Kirby Forest Industries v. United States*, 104 S.Ct. 2187 (1984).

"[C]onfiscation may result from a taking of the use of property without compensation quite as well as from the taking of the title." *Chicago Rock Island and Pacific Ry. v. United States*, 284 U.S. 80, (1931). This issue was discussed at length in *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 57 L.Ed.2d 631, 98 S.Ct. 2646 (1978). In that case, Penn Central was questioning the validity of the historic zoning ordinance which limited the use of Grand Central Station.

> The question presented is whether a city may, as a part of a comprehensive program to preserve historic landmarks and historic districts, place restrictions on the development of individual historic landmarks — in addition to those imposed by applicable zoning ordinances — without effecting a "taking" requiring payment of "just compensation."

In answering the question the Court considered the economic impact of the regulation and the extent to which the regulation interfered with distinct investment-backed expectations. Penn Central had argued that because they could not exploit all of the property interest held, that they should be compensated. This

Court then found that a taking had not occurred in that there were many uses available to Penn Central for the property.

Petitioners have no economically viable use remaining for their property.

> The property has been thus subjected to a non-consensual servitude not borne by any neighboring or similar properties.

Penn Central Transportation Co. v. New York City, 438 U.S. 104, 57 L.Ed.2d 631, 98 S.Ct. 2646 (1978); dissenting opinion, J. Rehnquist.

The easement imposed upon the property denies the Matchas the economically viable use of the land. *Hodel v. Virginia Surface Mining and Reclamation Association,* 452 U.S. 264, (1981). The judgment at issue restricts the Matchas' use of the land, requires them to tear down the remainder of their residence located on the land and to destroy sand dunes and other artifices on the land. This regulatory activity on the part of the State of Texas constitutes a taking.

The Matchas have no remaining economic value or residual market value in their land due to the Judgment imposing an easement upon it. When property has been rendered unfit for economically viable activity, a Fifth Amendment taking occurs even though the property continues to have a market value. *Kaiser Aetna v. United States,* 444 U.S. 164 (1979). Therein this Court stated:

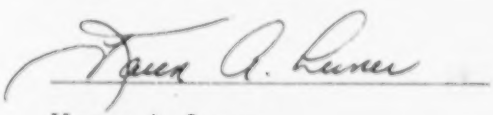
> In this case, we hold that the "right to exclude," so universally held to be a fundamental element of the property right, falls within this category of interest that the Government cannot take without compensation. This is not a case in which the Government is exercising its regulatory power in a manner that will cause an insubstantial devaluation of Petitioners' private property; rather, the imposition of the navigational servitude in this context will result in an actual physical invasion of the privately owned property.

Since the creation of an easement constitutes a physical invasion on to the land of the Matchas, and a taking within the meaning of the Fifth Amendment as made applicable to the states by the Fourteenth Amendment, the opinion of the Court of Appeals should be reversed.

CONCLUSION AND PRAYER FOR RELIEF

WHEREFORE, Robert Matcha and Ann Morgan Matcha, for the reasons stated, respectfully submit that this application for writ of certiorari should be granted, and that the Supreme Court should reverse the Judgment of the Court of Appeals for the Third Supreme Judicial District of Texas, Austin, Texas, and reverse the Judgment of the Trial Court and render a Judgment for the Appellants.

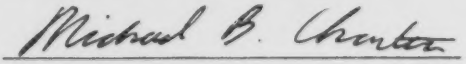
Respectfully submitted,



Karen A. Lerner
Michael B. Charlton
2110 Richmond Avenue
Houston, Texas 77098
(713) 526-1630
Bar No. 12223300

CERTIFICATE OF SERVICE

I, Michael B. Charlton, a member of the Bar of this Court, hereby certify that on this 16th day of February, 1987, three copies of the Petition for Writ of Certiorari in the above entitled case were mailed, first class postage prepaid, to Ken Cross, Assistant Attorney General, Supreme Court Building, Austin, Texas 78705, counsel for Respondent herein. I further certify that all parties required to be serviced have been serviced.



Michael B. Charlton
Karen A. Lerner
2110 Richmond Avenue
Houston, Texas 77098
(713) 526-1630
Bar No. 12223300

Cause No. _____

In the

Supreme Court of the United States

October Term, 1986

ROBERT MATCHA AND ANNE MORGAN MATCHA

Petitioners,

-v.-

JIM MATTOX, ATTORNEY GENERAL OF TEXAS
ON BEHALF OF THE PEOPLE OF TEXAS

Respondent

APPENDIX TO
Petition for a Writ of Certiorari
To The Court Of Appeals
For The Third Supreme Judicial District Of Texas
Sitting In Austin, Texas

Karen A. Lerner
Michael B. Charlton
2110 Richmond Avenue
Houston, Texas 77098
(713) 526-1630
Bar No. 12223300

Counsel for Petitioners

February 16,1987

NO. 354,178

JIM MATTOX, Attorney General of Texas, on behalf of the People of Texas,	§	IN THE DISTRICT COURT OF
Plaintiff,	§	TRAVIS COUNTY, TEXAS
V.	§	
ROBERT L. MATCHA and wife, ANNE MORGAN MATCHA,	§	
Defendants.	§	250TH JUDICIAL DISTRICT

FINAL JUDGMENT AND ORDER OF INJUNCTION

BE IT REMEMBERED that on September 13-20, 1984, came on to be heard the above-captioned cause, wherein the Attorney General of Texas, acting for and on behalf of the People of Texas, is Plaintiff, and Robert L. Matcha and Anne Morgan Matcha are Defendants.

And came Plaintiff, by and through the Attorney General of Texas, and came the Defendants, in person and by and through their attorneys of record, and all parties announced ready for trial.

Be it further remembered that a jury of twelve good and lawful citizens was duly impaneled and sworn; and came the parties and offered evidence before the Court and jury.

Be it further remembered that the jury and the Court heard the pleadings and the evidence.

At the conclusion of the evidence, and prior to the submission of the case to the jury, three Motions for Instructed Verdict were made by the Defendants, Robert Matcha and Anne Morgan Matcha, which motions were all overruled by the Court.

At the conclusion of the evidence, and prior to the submission of the case to the jury, and on motion of the Plaintiff for instructed verdict, the Court removed the cause of action from the jury and rendered Judgment for the Plaintiff that the Defendants' property and activities complained of in Plaintiff's Second Amended Original Petition on file with the Court were contrary to TEX. NAT. RES. CODE ANN., §61.018, in that Defendants' beach house, sand piles and plantings, are obstructions or barriers which interfere with the free and unrestricted use of the public beach easement and should be removed. Following said action the parties did not require the Court to return the jury and to instruct them to render a verdict. The Court, without objection from the parties, directed the district clerk to discharge the jury.

More specifically, the Court concluded as a matter of law:

(1) That the public has acquired through prescription, dedication, and custom (a right retained by virtue of continuous right in the public since time immemorial) the free and unrestricted right of access to and use and easement over the beach in the vicinity of the Defendant's property, said beach being that area defined at common law and in TEX. NAT. RES. CODE ANN. § §61.001-61.024 as the area bordering on the Gulf of Mexico between the line of mean low tide and the natural line of vegetation, this latter boundary being the extreme seaward boundary of natural vegatation which spreads continuously inland;

(2) That such public right of access, use, and easement follows the beach as the beach moves landward and seaward with the natural movements of the line of mean low tide and the natural line of vegetation;

(3) That the natural line of vegetation in the vicinity of Defendants' property has most recently moved landward under the influence of Hurricane Alicia so that Defendants' land and improvements thereon currently occupy a portion of the beach, as defined at common law and in TEX. NAT. RES. CODE ANN. § §61.001-61.024;

(4) That Defendants engaged in activities to reconstruct a beach house and to place sand piles and plantings of vegeta-

tion seaward of the natural line of vegetation, and accordingly on the beach as defined at common law and in TEX. NAT. RES. CODE. ANN. §§61.001-61.024; and

(5) That such beach house, sand piles, and vegetation plantings constitute obstructions, barriers, restraints, and interferences with the free and unrestricted public right of access to and use of the beach where Defendants' property is situated.

Accordingly, it is ORDERED, ADJUDGED, AND DECREED, that the public has acquired the free and unrestricted right of access, use and easement to and over the beach in the vicinity of Defendants' land, said beach being that area defined at common law and in TEX. NAT. RES. CODE. ANN. §§61.001-61.024 as the area bording on the Gulf of Mexico between the line of mean low tide and the natural line of vegetation. Defendants' land, being "the surface only of the South 70 feet of Lot 60 and a 30' strip adjacent thereto on the South of said Lot 60, SEA ISLE, a Subdivision, in Galveston County, Texas, according to the map thereof recorded in Map Volume 254-A, page 76, and in the office of the County Clerk of Galveston County, Texas," is subject, and thus servient, to this right of access, use and easement in the public by virtue of the location of Defendants' land within this described beach area. Said right of access, use and easement in the public to the above-described beach area shall always follow the beach as the beach area moves with the natural movements and fluctuations of the line of mean low tide and the natural line of vegetation.

It is further ORDERED, ADJUDGED, and DECREED, pursuant to TEX. NAT. RES. CODE. ANN. §61.081, that Defendants Robert L. Matcha and Anne Morgan Matcha, their agents, servants and employees, shall remove at Defendants' own expense any and all parts of the beach house, sand piles, plantings, or any other obstruction or barrier to the public's use of the beach area defined above and situated on their land. Defendants shall complete such removal by no later han sixty (60) days following the date upon which this judgment and order of injunction becomes final pursuant to law.

It is further ORDERED, ADJUDGED and DECREED that the enforcement of the removal of any and all parts of the beach house, sand piles, or plantings from the above-referenced property is stayed upon the posting with the District Clerk of Travis County, Texas, a bond or other good and sufficient surety, in the total sum of five hundred dollars ($500.00). Said stay shall remain in full force and effect until the exhaustion of all appellate process in this cause, if any. Additionally, public exercise of the beach easement rights decreed above on and over Defendants' property is stayed pending exhaustion of all appellate process in this cause, if any.

It is further ORDERED, ADJUDGED and DECREED that the Order of Temporary Injunction signed by this Court on the 27th day of January, 1984, is hereby dissolved.

It is further ORDERED, ADJUDGED, and DECREED, pursuant to TEX. NAT. RES. CODE. ANN. §61.018, that Defendants Robert L. Matcha and Anne Morgan Matcha, their agents, servants and employees, are hereby enjoined from engaging in any activity, including the construction of any structures and the placement or nourishment of plants, which restrains or interferes with the right of the public, individually or collectively, to free and unrestricted access to and use of the beach area described above.

It is further ORDERED, ADJUDGED, and DECREED that this final judgment shall be a judgment in rem against the land which it affects, namely: The surface only of the South 70 feet of Lot 60, SEA ISLE, a Subdivision, in Galveston County, Texas, according to the map thereof recorded in Map Volume 254-A, page 76, in the office of theCounty Clerk of Galveston County, Texas.

It is further ORDERED, ADJUDGED and DECREED that Plaintiff have and recover from Defendants all costs of court in this cause, including but not limited to the taxable cost to Plaintiff of taking depositions.

It is further ORDERED, ADJUDGED and DECREED that Plaintiff shall have all writs of injunction and execution and other

process necessary to enforce the terms of this final judgment and order of injunction.

SIGNED this _____ day of _____, 1984.

/s/ Harley Clark

HARLEY CLARK
JUDGE PRESIDING

APPROVED AS TO FORM:

JIM MATTOX
Attorney General of Texas

DAVID R. RICHARDS
Executive Assistant Attorney General

BEN F. McDONALD
Group Leader, Energy and Environmental Protection Division

JIM MATTHEWS
Assistant Attorney General
Chief, Environmental Protection Division

/s/ Karen A. Lerner

KAREN A. LERNER
(SBN 12223300)

/s/ Harold F. Harris

HAROLD F. HARRIS
(SBN 09061500)
2715 Bissonnet, Suite 104
Houston, Texas 77005
(713) 526-1630

ATTORNEYS FOR DEFENDANTS
ROBERT L. MATCHA AND
ANN MORGAN MATCHA

/s/ Ken Cross

KEN CROSS (SBN05135800)
Assistant Attorney General

/s/ Linda B. Secord

LINDA B. SECORD
(SBN 17973400)
Assistant Attorney General
Environmental Protection Division

P. O. Box 12548
Austin, Texas 78711
(512) 475-1101
TTORNEYS FOR PLAINTIFF

IN THE COURT OF APPEALS,
THIRD SUPREME JUDICIAL DISTRICT OF TEXAS,
AT AUSTIN

JUDGMENT RENDERED MAY 21, 1986

14,384 — ROBERT L. MATCHA, ET UX. V. HONORABLE JIM MATTOX, ATTORNEY GENERAL OF TEXAS, ON BEHALF OF THE PEOPLE OF TEXAS

APPEAL FROM 250TH DISTRICT COURT OF TRAVIS COUNTY

Before Chief Justice Shannon, Justices Gammage and Carroll

AFFIRMED — Opinion by Chief Justice Shannon

THIS CAUSE came on to be heard on the transcript of the record and same being inspected, because it is the opinion of the Court that there was no error in the trial court's judgment: IT IS THEREFORE considered, adjudged and ordered that the judgment of the trial court be and is hereby in all things affirmed. It is FURTHER ordered that appellants, Robert L. Matcha and Anne Morgan Matcha, as principals, and Lawyers Surety Corporation, as surety on the appeal bond herein, pay all costs of this appeal; and that this decision be certified below for observance.

IN THE COURT OF APPEALS,
THIRD SUPREME JUDICIAL DISTRICT OF TEXAS,
AT AUSTIN

NO. 14,384

ROBERT L. MATCHA, ET UX.,
Appellants,

vs.

HONORABLE JIM MATTOX, ATTORNEY GENERAL
OF TEXAS, ON BEHALF OF THE PEOPLE OF TEXAS,
Appellee

FROM THE DISTRICT COURT OF TRAVIS COUNTY,
250TH JUDICIAL DISTRICT NO. 354,178,
HONORABLE HARLEY CLARK, JUDGE

Robert L. Matcha and Anne Morgan Matcha, husband and wife, seek to set aside a judgment of the district court of Travis County in an "open beach" suit. *See* Tex. Nat. Res. Code Ann. § 61.001 *et seq.* (1978 & Supp. 1986). After a jury trial the district court directed a verdict and rendered judgment which, in general, prohibits the Matchas from interfering with the public's right of free access to and over the beach. This Court will affirm the judgment.

The attorney general pleaded that the Matchas own a lot in the Sea Isle subdivision on Galveston Island. Before August 18, 1983, a frame beach house stood on that lot. On that day a violent hurricane nearly destroyed the house — only portions of the

foundation, pilings, floor, and walls of the structure remained. After the storm, the remains of the dwelling were located entirely seaward of the natural line of vegetation on the beach.

After the Matchas commenced reconstruction of the beach house, the attorney general posted notice on the structure that its repair might be in violation of law. Nontheless, the Matchas continued the reconstruction and continued hauling in soil and setting out plants around the house, all such plants being seaward of the natural line of vegetation. The attorney general then obtained restraining and temporary injunctive orders from the district court prohibiting the continuation of repairs.

The attorney general pleaded that the public had acquired rights in the beach area where the Matchas' house, hauled-in-soil and planted vegetation were situated. More specifically, the attorney general asserted that in the beach area between the line of mean low tide and the line of natural vegetation, the public had acquired a right of use or an easement by reason of prescription, dedication, or estoppel, or had retained a right of use and an easement because of continuous right in the public since time immemorial as recognized by law or custom. The attorney general claimed, accordingly, that whatever right the Matchas had to the area was subordinate to the right of lawful use of and access to the area by the general public.

The attorney general pleaded factually that the line of mean low tide and the vegetation line along the beaches of Galveston Island are affected by numerous natural and artificial factors including climate, storm frequency and intensity, local and eustatic sea level conditions, sediment budget, and human activities. Along certain portions of the beach, these effects have been nominal and, as a result, the public beach area has been relatively stationary over the years. However, along other parts of the beach, these effects have been dramatic and, a result, the public beach area has shifted laterally over relatively short periods of time.

The attorney general pleaded, among other things, that the Matchas' reconstruction of their house and their placement of earth and plants about the structure obstructed the common law right of the public to use the beach.

The underlying facts are undisputed. The Matchas own lot sixty in the Sea Isle subdivision on the West Beach of Galveston Island. In 1982, they built a beach house on the lot which was located immediately landward of the natural vegetation line as it existed in the summer of 1982. The powerful hurricane of August 1983 eroded the natural vegetation line landward about one hundred twenty-five to one hundred fifty feet from its prior position. The natural vegetation line was then landward of the Matchas' beach house. After the 1983 hurricane and before trial, the Matchas filled in their lot with earth and planted grass which they tended and cultivated.

In its judgment the district court concluded:

> (1) that the public has acquired through prescription, dedication, and custom (a right retained by virtue of continuous right in the public since time immemorial) the free and unrestricted right of access to and use and easement over the beach in the vicinity of the Matchas' property, said beach being that area defined at common law and in Tex. Nat. Res. Code Ann. § § 61.001-61.024 as the area bordering on the Gulf of Mexico between the line of mean low tide and the natural line of vegetation, this latter boundary being the extreme seaward boundary of natural vegetation which spreads continuously inland;
>
> (2) that such public right of access, use, and easement follows the beach as the beach moves landward and seaward with the natural movements of the line of mean low tide and the natural line of vegetation;
>
> (3) that the natural line of vegetation in the vicinity of the Matchas' property has most recently moved landward of the Matchas' property under the influence of Hurricane Alicia (the August 1983 hurricane) so that the Matchas' land and improvements thereon currently occupy a portion of the beach, as defined at common law and in Tex. Nat. Res. Code Ann. § § 61.001-61.024;
>
> (4) that the Matchas attempted to reconstruct a beach house and to place sand piles and plantings of vegetation seaward of

the natural line of vegetation, and accordingly on the beach as defined at common law and in Tex. Nat. Res. Code Ann. § § 61.001-61.024; and

(5) that such beach house, sand piles, and vegetation plantings constitute obstructions, barriers, restraints, and interferences with the free and unrestricted public right of access to and use of the beach where the Matchas' property is situated.

The judgment declared that the Matchas' property is servient to the public's right of access, use and easement because of the location of the Matchas' land on the public beach. The district court determined that the public had acquired such easement and right of access and use through (1) prescription; (2) dedication; and (3) custom (a right retained by virtue of continuous right in the public since time immemorial). The public's right of access, use and easement to the beach area follows the beach as it moves with the natural movements and fluctuations of the line of mean low tide and the natural line of vegetation.

The judgment ordered the Matchas to remove the beach house, sand piles, plantings, and any other obstructions or barrier to the public's use of the beach area. The district court enjoined the Matchas from engaging in any activity, including the construction of any structures and the placement or nourishment of plants, which restrains or interferes with the right of the public, individually or collectively, to free and unrestricted access to and use of the beach area. Finally, the judgment declared that it was a judgment *in rem* against the land which it affects.

In lengthy briefs, the Matchas attack the district court's judgment and conclusions by twenty-six points of error. By numerous points, the Matchas claim that the district court erred in its preliminary conclusion that the public had acquired a free and restricted easement and right of access to and use of the beach in the vicinity of the Matchas' property. This Court will overrule the points of error and will affirm the judgment upon the basis that the public acquired a right of use or an easement in the vicinity of the Matchas' property by custom.

Custom is an ancient common law doctrine. "If A hath the ripa, or bank, of the port, the king may not grant a liberty to unlade upon the bank, or ripa, without his consent, unless custom had made the liberty thereof free to all, as in many places it is . . . ."City of Galveston v. Menard, 23 Tex. 349, 408 (1859) (Justice Roberts quoting Lord Hale).

Mercer v. Denne, 2 Ch. 538 (1905), involved the custom of fishermen in the parish of Wolmer of drying their fishing nets on the "beach ground." The suit arose when the owner of the beach ground attempted to prevent the fishermen from continuing this longstanding practice. Over the landowner's protestations that the custom made his land useless to him, the court held that the fishermen's net-drying practices had continued since "time immemorial," and had become a legal right which the landowner could not interrupt. The court recognized that, although the beach area had migrated somewhat over the years, "the custom began at the boundary between beach and sea." Hence, the court concluded, ". . . the area for drying would always be adjacent to the boundary for the time being between the beach and the sea." 2 Chancery Division at 579.

Courts in several states have adopted the custom doctrine for determining public rights in beaches. In State ex rel. Thorton v. Hay, 462 P.2d 671 (Or. 1969), the Oregon Supreme Court first discussed dedication and prescription, and concluded that either of those doctrines would justify finding a public right to use privately-owned drybeach areas along the Oregon coast. "We believe, however, that there is a better legal basis for affirming the decree. The most cogent basis for the decision in this case is the English doctrine of custom." *Id.* at 676. Citing Blackstone, the court then enumerated the elements required to find that a custom exists: the public use must be ancient, peaceable, certain, obligatory, exercised without interruption, and not repugnant with other custom or law. *Id.* at 677. Since the public had freely used the dry-sand area along the Oregon coast for as long as there had been an institutionalized land tenure system in the state, the court concluded that the requirements had been met and the public custom had become a legal right. *Id. See also* City of Daytona

Beach v. Tona-Rama Inc., 294 So.2d 73 (Fla. 1974); State ex rel. Haman v. Fox, 594 P.2d 1093 (Idaho 1979); Application of Ashford, 440 P.2d 76 (Hawaii 1968).

In Texas, the common law, by force of statute, continues in effect until altered or repealed by the Legislature. Tex. Civ. Pract. & Rem. Code § 5.001(1986). The statute makes the common law presumptively applicable unless good reason exists for not applying. "We apply the common law to our conditions when our conditions are similar to those out of which the common law arose, but when the common law is not applicable, because of different conditions, we do not apply it." Motl v. Boyd, 286 S.W. 458, 470 (Tex. 1926).

The doctrine of custom has been acknowledged and approved in at least two Texas opinions, although the appeals in those opinions were disposed of on other grounds. In City of Galveston v. Menard, 23 Tex. 349 (1849), an opinion involving East Beach on Galveston Island, the Supreme Court specifically recognized that rights in the beach area may be acquired by custom. The court concluded, however, that because Galveston had only been settled for twenty years "no immemorial custom, in relation to rights on the coast, had matured into a common law . . . ." 23 Tex. at 394.

The Corpus Christi Court of Civil Appeals in Moody v. White, 593 S.W.2d 372 (Tex. Civ. App. 1979, no writ) affirmed a judgment declaring that the public had free and unrestricted right of ingress and egress to and the right of use and an easement to and over the beach at Mustang Island outside Port Aransas. The judgment was founded upon jury findings of prescription, dedication, and custom. The court stated "(W)e will not discuss the theory of custom other than to say that we recognize the doctrine and that the jury's findings in that regard are supported by sufficient evidence." *Id.* at 379.

No one doubts that proof exists from which the district court could conclude that the public acquired an easement over Galveston's West Beach by custom. As early as 1836, the public used the beach for travel. Dyer, The Early History of Texas, 59

(1916). That use has continued through the years. In Seaway Company v. Attorney General of Texas, 375 S.W.2d 923 (Tex. Civ. App. 1964, writ ref'd n.r.e.) one reads recollections of venerable witnesses about a lifetime of driving, swimming and fishing along the Galveston beach. No one ever asked these persons if they had permission to use the beach and on one ever tried to stop them from that use. These persons just "figured" everyone had the right to use the beach.

By other points, the Matchas attack the district court's conclusion that the public's right of access, use, and easement follows the beach as it moves landward and seaward with the natural movements of the line of mean low tide and the natural line of vegetation. We overrule those points.

The law in this State has recognized migrating property rights in several contexts, most of which involve land near a body of water. The most analogous situation involves the transitory line between state and private property on the beachfront. It is established that the line of mean high tide marks the boundary between private beachfront property and the state's submerged property. Furthermore, this boundary line may move landward or seaward as the beach moves, and the property lines move accordingly. State v. Balli, 190 S.W.2d 71 (Tex. 1944), City of Corpus Christi v. Davis, 622 S.W.2d 640 (Tex. App. 1981, writ ref'd n.r.e.). (If the sea encroached and the upland owner lost his land, he had no redress; if alluvion formed adjoining the seashore, the latter receded with the tide line, and . . . any new alluvion which formed above the tide line should become a part of the contiguous upland estate.)

Although an easement is generally a static real property concept, several Texas opinions have recognized that easements bordering on a body of water may be moved by the water's action. In Moody v. White, *supra*, the court recognized the migratory nature of the public beach easement:

> On one boundary the public beach is determined by the line of mean low tide, while the landward side is marked by the line of vegetation. Although these boundaries do tend to shift occasionally, they can be determined at any given point in time.

> The rule has been established that easements may shift from time to time, just as navigable rivers may change course by avulsion.
>
> 593 S.W.2d at 379.

The court in *Moody* referred to earlier riverbed avulsion opinions, and applied the rule from those opinions to the analogous beachfront erosion situation. Our courts have had more experience with riverfront easements, and the rule is well-established that erosion and accretion along a river can move property lines. In Nonken v. Bexar County, 221 S.W.2d 370 (Tex. Civ. App. 1949, writ ref'd n.r.e.), the court upheld a roadway easement over a creek even though the roadway had shifted some 35 feet over the years due to rains and washouts along the creek bottom.

Indeed, the theory of a migratory public easement is compatible with the doctrine of custom and the situations that often give rise to a custom. A public easement on a beach cannot have been established with reference to a set of static lines on the beach, since the beach itself, and hence the public use of it, surely fluctuated landward and seaward over time. The public easement, if it is to reflect the reality of the public's actual use of the beach, must migrate as did the customary use from which it arose. The law cannot freeze such an easement at one place any more than the law can freeze the beach itself. Custom is, after all, a reflection in law of a long-standing public practice, and therefore the legal result should mirror the factual reality as closely as possible.

Applying static real property concepts in this appeal would produce completely unworkable results if the beach continues to move. An easement fixed in place while the beach moves would result in the easement being either under water or left high and dry inland, detached from the shore. Such easement, meant to preserve the public right to use and enjoy the beach, would then cease functioning for that purpose. Because of these factors and because legal title shifts with the natural movements of the beach, State v. Balli, *supra*; City of Corpus Christi v. Davis, *supra*, this Court has concluded that the public easement also shifts with the natural movements of the beach.

By several points of error, the Matchas argue that two judgments in former litigation determined the location of the vegetation line near their lot and determined further that the vegetation line had not moved in two hundred years. Accordingly, the Matchas suggest those judgments bar relitigation of the location of the vegetation line. One such judgment is that of the district court in Seaway v. Attorney General of Texas, *supra.* The other judgment is a district court judgment from which no appeal was taken, which is referred to in the briefs as John Hill, Attorney General of Texas v. West Beach Encroachment, et al. The Matchas' ill-defined *res judicata* argument fails for at least two reasons.

First, the West Beach Encroachment judgment, which the Matchas claim conclusively adjudicated the location of the vegetation line, is not of record in this appeal. This judgment was not admitted into evidence, and the Matchas have not complained on appeal of its exclusion.

Second, the vegetation line is not a static line which can be conclusively located and adjudicated for all time. Under the doctrine of changed circumstances, unstable or changeable matters like a vegetation line cannot be finally adjudicated, but are always open to relitigation. Franklin v. Rainey, 556 S.W.2d 583 (Tex. Civ. App. 1977, no writ). In *Franklin*, a suit between the same parties twenty years previously had resulted in a judgment determining that Franklin had diverted the natural water course and flooded Rainey's land. In a subsequent suit, involving the same issues, Rainey's successor asserted that the prior suit was *res judicata* and precluded the present suit. The Dallas Court of Civil Appeals disagreed:

> The judgment is res judicata only of present and not of future conditions. Here, during the more than twenty years that have elapsed since the judgment in the prior action, the ditch has been obstructed through neglect, and the levee has deteriorated so as not to operate effectively, thus changing again the flow of surgace water and creating new conditions. Because the flow of the water has substantially changed since that judgment was rendered, we hold that there is a lack of subject

> matter indentity for the prior judgment to be res judicata of this suit. Although there may be similarity of subject matter . . ., it does not follow that the prior judgment is res judicata to the present case because of facts occurring in the intervening years which may alter the rights of the parties.
>
> 556 S.W.2d at 585.

By four points of error, the Matchas attack Tex. Nat. Res. Code § 61.013 as having been enacted into law by a bill which contained an unconstitutional caption and as authorizing a taking without just compensation. The points of error are overruled.

Section 61.013 provides for civil penalties varying from $50 to $1000 for obstructing the beach. An examination of the judgment shows that the district court imposed no civil penalties upon the Matchas. The district court further concluded in the judgment that the public acquired the complained-of-easement not by virtue of the Open Beaches Act, but instead through prescription, dedication, and custom. This Court has affirmed the district court's judgment declaring the easement upon the basis of custom.

The judgment is affirmed.

/s/ Bob Shannon

Bob Shannon, Chief Justice

(Before Chief Justice Shannon, Justices Gammage and Carroll)

Affirmed

Filed: May 21, 1986

SUPREME COURT OF TEXAS
P.O.Box 12248
Supreme Court Building
Austin, Texas 78711

Mary M. Wakefield, Clerk

November 19, 1986

Ms. Karen A. Lerner
2715 Bissonnet
Suite 104
Houston, TX 77005

Mr. Ken Cross
Office of the Attorney General
P.O. Box 12548 Capitol Station
Austin, TX 78711

RE: Case No. C-5563

STYLE: ROBERT L. MATCHA ET UX.
v. HONORABLE JIM MATTOX, ATTORNEY GENERAL OF TEXAS

Dear Counsel:

The application for writ of error in the above-styled case was this day refused, no reversible error.

Chief Justice Hill not sitting.

Respectfully yours,

Mary M. Wakefield, Clerk

By */s/ Blanca E. Morin*
Deputy

NO. 354,178

JIM MATTOX, Attorney General of Texas, on behalf of the People of Texas,	§	IN THE DISTRICT COURT OF
Plaintiff,	§	TRAVIS COUNTY, TEXAS
V.	§	
ROBERT L. MATCHA and wife, ANNE MORGAN MATCHA,	§	
Defendants.	§	250TH JUDICIAL DISTRICT

PLAINTIFF'S FIRST AMENDED ORIGINAL PETITION

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW, Jim Mattox, Attorney General of the State of Texas, on behalf of the people of Texas ("plaintiff"), and files this First Amended Original Petition. For cause of action plaintiff would respectfully show the Court the following:

I.

Nature

This suit is brought by plaintiff on behalf of the people of the State of Texas pursuant to the authority and duty conferred by Sections 61.001-61.024, TEX. NAT. RES. CODE, commonly known as the "Texas Open Beaches Act." This suit is brought to protect the right of the people to the public beach area, which is is that area extending inland from the line of mean low tide to the line of vegetation bordering on the Gulf of Mexico where the public has acquired a right of use or easement by prescription, dedication, estoppel, law, or custom. More particularly, this suit has

been brought for temporary injunctive relief, and permanent injunctive relief to remove an obstruction on the public beach area and to prohibit any restraint or interference with the right of public use and access in the public beach area.

II.

Parties

Plaintiff, Jim Mattox, Attorney General of Texas, brings this action on behalf of the people of the State of Texas pursuant to specific statutory authorization, namely §61.018, TEX. NAT. RES. CODE.

Defendants, Robert L. Matcha and wife, Anne Morgan Matcha are residents of Harris County, Texas. They have been served with process and have appeared in this action by written answer.

III.

Jurisdiction and Venue

This Court has jurisdiction of this proceeding pursuant to §61.018(a), TEX. NAT. RES. CODE.

Venue for this proceeding is proper in Travis County pursuant to §61.018(a), TEX. NAT. RES. CODE.

IV.

Open Beaches Act

Section 61.013, TEX. NAT. RES. CODE, (Supp. 1982) provides:

> (a) It is an offense against the public policy of this state for any person to create, erect, or construct any obstruction, barrier, or restraint that will interfere with the free and unrestricted right of the public, individually and collectively:
>
> (1) to enter or to leave any public beach; or
>
> (2) to use lawfully and legally any public beach or any larger area abutting on or contiguous to a public beach if the public has acquired a right of use or easement to or over the

area by prescription, dedication, or has retained a right by virtue of continuous right in the public.

(b) For purposes of this section, 'public beach' shall mean any beach bordering on the Gulf of Mexico which extends inland from the line of mean low tide to the natural line of vegetation bordering on the seaward shore of the Gulf of Mexico, or such larger contiguous area to which the public has acquired a right of use or easement to or over by prescription, dedication, or estoppel, or has retained a right by virtue of continuous right in the public since time immemorial as recognized by law or custom.

V.

Defendants' Structure

Defendants, Robert L. Matcha and wife, Anne Morgan Matcha, own certain land located on or adjacent to the Gulf of Mexico beach in the Sea Isle subdivision on Galveston Island. More particularly, defendants own the thirteenth lot southwest of the intersection of San Jacinto Drive and the Gulf of Mexico shore in Sea Isle. This lot is described in the deed records of Galveston County as follows:

> The SURFACE ONLY of the South 70 feet of Lot 60 and a 30' strip adjacent thereto on the South of said Lot 60, SEA ISLE, a Subdivision, in Galveston County, Texas, according to the map thereof recorded in Volume 254-A, page 76, in the office of the County Clerk of Galveston County, Texas.

A copy of the deed to this property is attached to this petition as Exhibit A.

Plaintiff would show that upon the above-described lot is the remaining foundation, floor, and portions of walls of a wood-frame house that was substantially destroyed during Hurricane Alicia on August 18, 1983. This structure is located entirely seaward of the line of vegetation. On September 7, 1983, the Texas Attorney General's Office posted notice upon this structure that reconstruction may be in violation of the Texas Open Beaches Act. A copy of this notice is attached to this petition as Exhibit B. Prior to

the posting of this notice, defendants, or their agents, had initiated the reconstruction, repair and rehabilitation of this structure. Subsequent to such posting defendants continued to engage in these activities. Unless restrained, defendants will continue to do so.

VI.

Public Beach

Plaintiff would show that the public has acquired a right of use or easement in the public beach area upon which is situated defendant's structure described above. In this area between the line of mean low tide and the line of vegetation, the public has acquired a right of use or easement by virtue of prescription or dedication or estoppel, or has retained a right of use and easement by virtue of continuous right in the public since time immemorial as recognized by law or custom. Accordingly, plaintiff would show that whatever rights, if any, defendants have to such area are subordinate to the right of lawful use and access of such area by the general public.

Plaintiff would show that the line of mean low tide and the vegetation line along the beaches of Galveston County, Texas, are affected by numerous natural and artificial factors including climate, storm frequency and intensity, local and eustatic sea level conditions, sediment budget, and human activities. Along certain portions of the beach, these effects have been nominal and consequently the public beach area has been relatively stationary over a period of many years. Along other parts of the beach, these effects have been dramatic and consequently the public beach area has shifted laterally over relatively short periods of time. Plaintiff would show the Court that it is the law and public policy of this State that the public beach area extends from the line of mean low tide to the line of vegetation wherever such lines may be located at any particular point in time.

In particular, plaintiff asserts that the public right of use and easement to the beach pertinent to these defendants has already been adjudicated and found to exist by virtue of Cause No. 93,728, *Attorney General of Texas, et al. v. Seaway Company,*

Inc., 122nd Judicial District, Galveston County, Texas, June 6, 1961. Plaintiff asserts that this adjudicated public beach easement has shifted landward and seaward over time with the natural shifting of the line of vegetation and the line of mean low tide. Defendants' property currently is encompassed in this adjudicated easement, which has most recently shifted in a landward direction by virtue of the erosive actions of Hurricane Alicia.

VII.

Violation

Plaintiff would show the Court that the reconstruction, repair, and rehabilitation of defendants' structure is the "creation, erection, or construction" of an "obstruction, barrier, or restraint that will interfere with the free and unrestricted right of the public" to "enter" and "lawfully use" the public beach area described above. Such activity is in violation of Section 61.013, TEX. NAT. RES. CODE and is contrary to the common law right of the public and the public policy of this State.

VIII.

Injunction

Section 61.018, TEX. NAT. RES. CODE, expressly provides for the imposition of prohibitory and mandatory injunctive relief in suits brought to protect the right of the public in the public beach areas of this State. The facts alleged above by plaintiff demonstrate that defendants are currently violating the Texas Open Beaches Act and the common law right of the public and interfering with lawful use and access of the public beach area. Unless restrained by this Court, defendants will continue to so violate the law. Accordingly, plaintiff seeks a permanent injunction which (1) restrains the defendants from continuing the reconstruction, repair, and rehabilitation of this structure, (2) requires defendants to remove the above-described structure and appurtenances to a location landward of the current natural line of vegetation, and (3) prohibits defendants from further interfering or restraining in any manner the right of the public to free and unrestricted use and access of the public beach area described herein.

WHEREFORE, PREMISES CONSIDERED, Plaintiff prays for the following:

(1) That defendants be permanently enjoined as set out in Paragraph VIII above and to otherwise refrain from interfering with the right of the public in the public beach area;

(2) For all costs of court; and

(3) For any further relief in law or in equity to which plaintiff may show itself justly entitled.

Respectfully submitted,

JIM MATTOX

Attorney General of Texas

DAVID R. RICHARDS
Executive Assistant Attorney General

JIM MATHEWS
Assistant Attorney General
Chief, Environmental Protection Division

/s/ Ken Cross

KEN CROSS
SBN 05135800
Assistant Attorney General
Environmental Protection Division

P. O. Box 12548
Austin, Texas 78711
(512) 475-4143

AFFIDAVIT

STATE OF TEXAS §

COUNTY OF TRAVIS §

BEFORE ME, the undersigned authority, on this day personally appeared David J. Preister, Assistant Attorney General, personally known to me, who being duly sworn, states that he is over 21 years of age, that he is competent to testify, that he is familiar with the facts and matters alleged in the preceding Petition, that he has read same, and that such facts are true and correct, and that he has authority to make this affidavit.

David J. Preister

David J. Preister

SUBSCRIBED AND SWORN TO before me this *23rd* day of *May*, 1984, by David J. Preister, to certify which, witness my hand and seal of office.

Barbara M. Duvall

Notary Public In and For
The State of Texas
My commission expires: *7/13/85*

STATE OF TEXAS §

COUNTY OF GALVESTON §

KNOW ALL MEN BY THESE PRESENTS:

That I, WILLIAM A MEYER, Grantor,

of Galveston County, Texas, in consideration of the sum of TEN AND NO/100 ----------Dollars ($10.00) paid by the grantees hereinafter named, the receipt of which is hereby acknowledged, and for the further consideration that said grantees,

ROBERT L. MATCHA and wife, ANN MORGAN MATCHA,
10142 Pebble Park Lane, Houston, Texas, 77036

have executed their one promissory note of even date herewith for the sum of

TWENTY THOUSAND AND NO/100----------Dollars ($20,000.00), payble to the order of WILLIAM A MEYER,

at Galveston, Texas,

bearing interest at the rate of 14% per cent per annum from date until maturity, past due principal and interest to bear 14% interest per annum from maturity until paid, principal and interest being payable in monthly installments of

FOUR HUNDRED SIXTY-FIVE AND 37/100-------Dollars ($465.37), or more, each, payable on the 1st day of each and every month, beginning July 1st, 1982, and continuing on the same day of each and every succeeding calendar month thereafter, until June 1, 1983, when the entire balance of principal remaining due and owing, plus all accrued interest thereon shall be then due and payable; interest being calculated on the unpaid principal to the date of each installment paid, and the payment made then credited, first to the discharge of the interest accrued, and the balance to the reduction of the principal.

BEST AVA

said note containing the usual provision for 10% attorney's fees and acceleration of maturity clauses and being secured by a VENDOR'S LIEN herein and hereby expressly retained in favor of the holder thereof on the property hereinafter described, and also by a DEED OF TRUST thereon of even date herewith to SAM G. TRAMONTE, Trustees have GRANTED, SOLD AND CONVEYED and by thse presents do GRANT, SELL AND CONVEY unto ROBERT L. MATCHA and wife, ANNE MORGAN MATCHA - - - Grantees, Address:10142 Pebble Park Lane, Houston, TX 77036,

of Harris County, Texas, all that certain property situated in Galveston, County Texas, described as follows, to-wit:

The SURFACE ONLY of the South 70 feet of Lot 60 and a 30' strip adjacent thereto on the South of said Lot 60, SEA ISLE, a Subdivision, in Galveston County, Texas, according to the map thereof recorded in Map Volume 254-A, page 76, in the office of the County Clerk of Galveston County, Texas.

This conveyance is made and accepted subject to the following:

1. Maintenance charge as described in instrument of record in Vol. 1921, page 557, in the office of the County Clerk of Galveston County, Texas.

Mineral reservations as described in Deeds of record in Vol. 957, page 350 and in Vol. 1037, page 367, both in said County Clerk's office.

3. Royalty reservation as described in deed of record in Vol. 565, page 419, in said County Clerk's office.

4. Right-of-way as described in instrument of record in Vol. 1169, page 201, in said County Clerk's office.

5. Utility and aerial easements as described in instruments of record in Vol. 254-A, page 76 and in Vol. 1921, page 557, both in said County Clerk's office.

LABLE COPY

6. Restrictions, covenants and conditions, to the extent same are still in effect, imposed on said property by instrument of record in Vol. 1921, page 557, in said County Clerk's office.

TO HAVE AND TO HOLD the said premises, together with all rights, hereditaments and appurtenances thereto belonging, unto the said grantee "above named, their heirs and assigns forever. And I do hereby bind myself, my heirs, executors and administrators, to WARRANT AND FOREVER DEFEND the title to said property unto the said grantees above named, their heirs and assigns, against every person whomsoever lawfully claiming or to claim the same, or any part thereof.

EXECUTED this, the *22nd* day of *May*, A.D. 1982.

/s/ William A. Meyer

WILLIAM A. MEYER

STATE OF TEXAS §
COUNTY OF GALVESTON §

Before me, the undersigned authority, on this day personally appeared WILLIAM A. MEYER, known to me to be the person whose name is subscribed to the foregoing instrument, and acknowledged to me that he executed the same for the purposes and consideration therein expressed.

Given under my hand and seal of office, this, the *22* day of *May*, 1982.

/s/ Barbara M. Duvall

Notary Public for the STATE OF Texas

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NOTICE

THIS STRUCTURE APPEARS TO BE LOCATED ON THE PUBLIC BEACH, BEING THAT AREA BETWEEN THE LINE OF MEAN LOW TIDE AND THE LINE OF NATURAL VEGETATION, SUBSTANTIAL REPAIR OR RECONSTRUCTION OF THIS STRUCTURE MAY BE IN VIOLATION OF THE TEXAS OPEN BEACHES ACT, SECTIONS 61.001-61.024, TEXAS NATURAL RESOURCES CODE. A VIOLATION OF THE ACT COULD RESULT IN COURT ORDERED REMOVAL OF THE STRUCTURE AND/OR ASSESSMENT OF CIVIL PENALTIES. FOR YOUR OWN PROTECTION, BEFORE INITIATING REPAIR OR RECONSTRUCTION, CONSULT:

TEXAS ATTORNEY GENERAL'S OFFICE
ENVIRONMENTAL PROTECTION DIVISION
P.O. BOX 78711
AUSTIN, TEXAS 78711
(512) 475-4143